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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 MITCH HIGHTOWER, *et al.*, No. C-12-5841 EMC
9 Plaintiffs,

10 v. **MOTION FOR LEAVE TO AMEND**
11 CITY AND COUNTY OF SAN **(Docket No. 110)**
12 FRANCISCO, *et al.*,
Defendants.

16 On February 2, 2015, Plaintiffs filed a motion for leave to amend their second amended
17 complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure. Docket No. 110.
18 Defendants filed their opposition on February 13, 2015. Docket No. 114. The Court has considered
19 the parties' submissions and determined that this matter is appropriate for resolution without oral
20 argument. *See* Civil Local Rule 7-1(b); *see also* Docket No. 115. For the reasons set forth below,
21 the Court **DENIES** Plaintiffs' motion for leave to amend.

I. BACKGROUND

23 On November 14, 2012, Plaintiffs filed their original complaint. Docket No. 1. On January
24 29, 2013, the Court denied Plaintiffs' motion for preliminary injunction and granted a motion to
25 dismiss. Docket No. 26. On March 15, 2013, Plaintiffs filed an amended complaint. Docket No.
26 30. Defendants answered. Docket No. 37. On July 3, 2014, the Court granted Plaintiffs' request for
27 leave to amend their complaint a second time. Docket No. 83. That same day, Plaintiffs filed their
28 second amended complaint. Docket No. 84. Two weeks later, Defendants moved to dismiss the

1 entirety of Plaintiffs' second amended complaint. Docket No. 86. Thereafter, the Court issued its
 2 scheduling order, setting out October 31, 2014 as the deadline for amending the pleadings. Docket
 3 No. 101. On December 24, 2014 the Court granted in part and denied in part Defendants' motion to
 4 dismiss. *See* Docket No. 104. Plaintiffs now seek leave to amend their complaint to file a third
 5 amended complaint in order to replead the claims dismissed. Docket No. 110.

6 **II. LEGAL STANDARD & DISCUSSION**

7 After a party has amended a pleading once as a matter of course, it may only amend further
 8 after obtaining leave of the court, or by consent of the adverse party. Fed. R. Civ. P. 15(a).
 9 Generally, Rule 15 advises the court that "leave shall be freely given when justice so requires." *Id.*
 10 However, "the grant or denial of a subsequent opportunity to amend is within the discretion of the
 11 District Court." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In determining whether leave should be
 12 granted pursuant to a District Court's discretion, the Supreme Court has stated that:

13 [i]n the absence of any apparent or declared reason – such as undue
 14 delay, bad faith or dilatory motive on the part of the movant, repeated
 15 failure to cure deficiencies by amendments previously allowed, undue
 16 prejudice to the opposing party by virtue of allowance of the
 17 amendment, futility of amendment, etc. – the leave sought should, as
 18 the rules require, be "freely given."

19 *Id.*

20 In the Ninth Circuit, the above listed factors—often referred to as the *Foman* factors—are
 21 not weighted equally. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir.
 22 2003) (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185 (9th Cir.1987)). Rather, courts
 23 have held that "the crucial factor is the resulting prejudice to the opposing party." *Howey v. United
 24 States*, 481 F.2d 1187, 1190 (9th Cir.1973).

25 In addition to the requisites of Rule 15, "[o]nce the district court [files] a pretrial scheduling
 26 order pursuant to Federal Rule of Civil Procedure 16 which establishe[s] a timetable for amending
 27 pleadings that rule's standards control[.]" *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,
 28 607-08 (9th Cir. 1992). Orders entered before the final pretrial conference may be modified only
 upon a showing of "good cause," Fed. R. Civ. P. 16(b). "A court's evaluation of good cause is not
 coextensive with an inquiry into the propriety of the amendment under . . . Rule 15." Rather, "Rule

1 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the
2 amendment." *Mammoth Recreations*, 975 F.2d at 609.

3 In this case, the Court's pretrial scheduling order provides the last day to amend the pleading
4 is October 31, 2014. Docket No. 101 at 2. Plaintiffs' current and third request to amend their
5 complaint was filed on February 2, 2015 – more than three months after the deadline. Docket No.
6 110. Plaintiffs must show good cause for not having amended their complaints before October 31,
7 2014 to prevail in their request. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir.
8 2000) (explaining that under Rule 16 of the FRCP, "[plaintiffs] must show good cause for not
9 having amended their complaints before the time specified in the scheduling order expired.")

10 Having reviewed the proposed amendments and the parties' briefs, the Court finds no good
11 cause for Plaintiffs' untimely amendment. First, Plaintiffs offer no explanation as to why they did
12 not conform with the pretrial scheduling order and seek to amend their pleadings prior to the
13 deadline. Second, Plaintiffs' proffered amendment largely pleads facts that have been known to
14 Plaintiffs since at least one year prior to the deadline, and which could have been added during any
15 of the prior amendments this Court permitted. Plaintiffs have not satisfied their burden of showing
16 good cause for their untimely amendment under Rule 16.

17 Plaintiffs' request is properly denied under Rule 15 as well. As noted, there was undue delay
18 in seeking to amend the allegations herein. Moreover, Plaintiffs seek to reinstate or add over ten
19 (10) events in which they believe their constitutional rights were violated. The amendment, if
20 permitted, will likely precipitate another motion to dismiss as well as additional discovery relative to
21 all these events. At this point, it will be impossible to maintain the April 30, 2015 discovery cutoff,
22 the scheduled deadline for dispositive motions and the trial date. Such delay constitutes legal
23 prejudice under *Foman*, and thus warrants denial of Plaintiffs' motion under Rule 15. *See Lockheed*
24 *Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("A need to reopen
25 discovery and therefore delay the proceedings supports a district court's finding of prejudice from a
26 delayed motion to amend the complaint.") (citing *Solomon v. North Am. Life & Cas. Ins. Co.*, 151
27 F.3d 1132, 1139 (9th Cir.1998)).

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1 The Court has granted Plaintiffs leave to amend their complaint multiple times. No further
2 delay will be permitted.

3 For the foregoing reasons, the Court **DENIES** Plaintiffs' motion for leave to amend its
4 complaint.

5 This order disposes of Docket No. 110.

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7 IT IS SO ORDERED.

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9 Dated: March 3, 2015

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11 EDWARD M. CHEN
12 United States District Judge